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JAMES H. McKENNEY,

In the Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 351.

ALEXANDER E. ORR, and Others, as Executors and Trustees of the Last Will and Testament of DAVID DOWS, Senior, Deceased, *et al*,

Plaintiffs in Error,

vs.

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,

Defendants in Error.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, IN THE STATE OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

JABISH HOLMES, Jr.,
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of Counsel

LIVINGSTON MIDDLEDITCH CO., 45 PARK ST., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

ALEXANDER E. ORR & Others, as Executors and Trustees of the Will of DAVID DOWS, SENIOR, and Others,
Plaintiffs in Error,

AGAINST

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,
Defendants in Error.

No. 351.

Brief for Defendants in Error.

The question presented is whether that portion of Chapter 284 of the Laws of 1897 of the State of New York, amending the Transfer Tax Law, by imposing a tax upon the succession created *by the exercise of a power of appointment*, violates the 14th Amendment. The constitutionality of the Law has been sustained by the Court of Appeals of New York, in the *Matter of Vanderbilt*, 163 N. Y., 597, affirming 50 App. Div., 246, on the opinion below (see opinion in Record, pp. 38-42); also in the second appeal in *Matter of Vanderbilt*, without opinion, 166 N. Y., 640, as well as on the appeal in this Case as Matter of Dows, 167 N. Y., 227, (see opinion in Record, pp. 44-48).

Statement.

DAVID DOWS, SENIOR, died March 30th, 1890, leaving a Will, which was admitted to Probate in New York County on April 14th, 1890 (Record, p. 2). The question arises under the Sixth and Eighth Clauses of the Will, which are printed in full in the Record, (Sixth Clause, Record, p. 5, fol. 8; Eighth Clause, Record, p. 8, fol. 14), and which Clauses are the same, so far as the question at issue is concerned.

By the Sixth Clause, David Dows, Senior, devised his interest in the Columbia and Dows stores, in Brooklyn, to his executors and their survivors, &c., the will providing,

> "I hereby direct that the title to the same shall, from and after my decease, *be vested* in my said Executors (or such of them as may qualify) and the survivors of them and their successors in trust,"

to collect the rents, &c., and to pay the income to his son David Dows, Jr., during his lifetime. The will then provided,

> "And *upon the death* of my said son the said property with all accumulations of interest, income and profits *shall vest* absolutely and at once, in such of his children him surviving and the issue of his deceased children, as he may, by his last will and testament, designate and appoint, and in such manner and upon such terms as he may legally impose" (Record, p. 5, fol. 8).

David Dows, Jr., exercised this power of appointment by his will in favor of his sons as hereinafter stated, and then for the first time the property *vested* in these children. The will is carefully drawn and under it, during the life of David, Jr., it expressly provides that the Executors as Trustees hold the legal title, and the children's legal title does *not vest* until David, Jr's, death and the exercise of the power by him.

The will of David Dows, Senior, further provides that in case David, Jr., dies intestate, or in other words, fails to exercise the power of appointment, *then on the*

death of David Dows, Jr., the property *shall vest* in his children in certain proportions and upon certain conditions (Record, p. 5, fol. 9).

These provisions are immaterial, because they did not take effect, as David, Jr., exercised the power, and the question of the right to tax *arises under the exercise of the power,* and, what the right to tax under the failure to exercise the power might be, is immaterial. Nevertheless, it should be noted that under the will of David Dows, Senior, *even in case of a failure to exercise the power, the property did not vest in the grandchildren until the death of their father,* the will expressly providing that, during the trust estate, the legal title should vest in the trustees and the legal title should not vest in the grand-children, until their father's death.

In the Eighth Clause of the Will of David Dows, Senior, (Record, p. 18) the same language is used as in the Sixth Clause above quoted. It vests in his Executors as Trustees one-eighth of the residuary estate in trust to pay the income to David Dows, Jr., and gives his son the same power of appointment as is given by the Sixth Clause.

Under the Will of David Dows, Senior, the Executors and Trustees were authorized in their discretion to sell the Dows and Columbia Stores mentioned in the Sixth Clause (Record, p. 6, fol. 10), and any of the testator's residuary real estate (Record, p. 8, fol. 13; p. 10, fol. 16).

During the life estate of David, Jr., and while the Dows and Columbia Stores and the residuary Real Estate was vested in the Executors and Trustees under the terms of the Will, they sold the stores and a large part of the residuary real estate, and invested the proceeds in personal property, under the powers contained in the Will of David Dows, Senior, so that on the death of David Dows, Jr., in 1899, all the property held by the Trustees affected by the proceedings, and over which David, Jr., had a power of appointment by the terms of his father's will, was all personal property.

David Dows, Jr., died January 13th, 1899, leaving

a will admitted to probate by the Surrogate of Westchester County, (Record, p. 2, fol. 3). By the Third Paragraph David Dows, Jr., exercised the power of appointment granted him by his father's will (Record, pp. 11-13). By this Paragraph David Dows, Jr., after reciting that by the Sixth and Eighth paragraphs of his father's will,

> "I am given the power to designate and appoint by will from among my children and their issue, the persons in whom certain property or the proceeds of certain property described in said Sixth and Eighth paragraphs *shall vest at my death,* now in pursuance and exercise of such powers I do hereby appoint, designate and direct as follows: The said property subject to my appointment and the whole thereof shall *vest upon my death* in my three children, David, Robert and Kenneth, in the following manner, viz. (Record, p. 11, fol. 19):"

To each of his sons he gave each the income of 3/48 thereof until Robert died or became twenty-one years of age, (Record p. 12, clauses (a), (d) and (g)); to each he also gave the income of 4/48 thereof, until Robert died or became 25 years of age (Record 12, clauses (b), (e) and (h)); to each he also gave the income of 9/48 thereof, until Robert died, or became 30 years of age (Record, p. 12, clauses (c), (f) and (i).) Thus each son was given the income of $\frac{1}{3}$ of the property. On the termination of these life estates, either by the death of Robert, or his attaining the age of 21, 25 or 30 (whichever event shall sooner happen) David Dows, Jr., gave the principal as follows: the portion of the estate of which David had the income went absolutely to Robert (Record, p. 12, clauses (a), (b) and (c);) the portion of which Robert had the income went absolutely to Kenneth, (Record, p. 12, clauses (d), (e) and (f);) the portion of which Kenneth had the income went absolutely to David, (Record, p. 12, clauses (g), (h) and (i). Thus the effect of the will of David Dows, Jr., was to give to each son a life estate *pur autre vie* in $\frac{1}{3}$ of the property, and a vested remainder in one-third of the principal, the income

of which one-third one of his brothers had enjoyed during the trusts. That there might be no doubt of the intention of David Dows, Jr., to give each son a vested remainder, he so states in his will.

> "It is my meaning that each of my said three sons shall take an estate *pur autre vie* in one equal share of all the property over which my said father's will gives me the power of appointment, such life estate to be measured by the life of my son Robert, or if he is dead, by that of my son Kenneth, with the possibility of such life estate being shortened, as to specified portions thereof, by Robert's or Kenneth's (as the case may be) reaching certain specified ages; and that each child, shall take also a remainder in another equal share, to take effect in possession at the close of his life estate in the other share; *but that each interest for life or remainder shall vest absolutely and at once upon my death, in legal and not equitable ownership, and without contingency*" (Record, p 13, fol. 21).

Under this will of David Dows, Jr., the property on the death of David, Jr., vested in his children in a different way than if the power had not been exercised. Under the will of David Dows, Senior, if the power had not been exercised, the property would have vested on the death of David, Jr., in 1899, in each of his three sons equally, as follows; as each grandson became 21 years of age he would have received $50,000, under the Sixth clause (Record, p. 6), and the same amount under the Eighth Clause (Record, p. 9); as each became 25 a further sum not exceeding $100,000 under the Sixth Clause (Record, p. 6), and the same amount under the Eighth Clause (Record, 9); as each became 30 years, the remainder under the Sixth Clause (Record, p. 6), and also the remainder under the Eighth Clause (Record, p. 9). After becoming 21 years of age, each child was to receive the entire income of his share under the Sixth Clause (p. 6), and the entire income of his share under the Eighth Clause (Record, p. 9). During minority each child could receive none of the income under the Sixth Clause, and only such sums, not exceeding $5,000 per year as in the judgment and

discretion of his guardian might seem proper for the maintenance, education and support of such child (Record, p. 9).

On the death of David Dows, Senior, in 1890, no tax was imposed by the Transfer Tax Law upon a bequest or devise to a child or grand-child, but before the death of David Dows, Jr., in 1899, and the exercise of the power of appointment by him, a tax of 1% had been imposed upon bequests of personal property to a child or grand-child, but no tax had been imposed upon a devise of Real Estate to such persons.

Prior to the death of David Dows, Junior, in 1899, the Legislature, by Chapter 284 of the Laws of 1897, amended Section 220 of the Taxable Transfer Law, by adding thereto a new subdivision, known as subdivision 5, which provided:

> §5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such ommissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

The constitutional validity of that portion of the above act imposing a tax on the succession created by exercise of a power of appointment, is the only question involved, as David Dows, Jr., exercised the power of appointment and the tax has been imposed upon the

succession thus created. As before pointed out, his children received different interest than if he had failed to exercise the power, and in the latter case the tax would have been different and different questions would have arisen which are not now before the Court.

The usual proceedings were taken under the Transfer Tax Act for ascertaining the value of the estate and the tax thereon. An appraiser was appointed (Record, p. 13), and he made his report as provided by Sec. 231 of the Transfer Tax Law, appraising the property, and ascertaining the value of the taxable interest. The appraiser gave notice of the appraisal to all parties interested, including the plaintiffs in error (Record, p. 14, fol. 24), and they appeared by Attorney (Record, p. 16, fol. 27) and filed objections to the proceedings which were overruled (Record, 16, paragraph Eighth).

Upon this order the Surrogate entered an order assessing a tax of 1% upon the valuations reported by the appraisers (Record, p. 25). The plaintiffs in error appealed from the order through the various Courts to the Court of Appeals, where the order, being affirmed, this writ of error is taken.

The assignments of errors are as follows:

First.—The Court of Appeals decided that the amendment of 1897 imposed a tax upon the succession created by the exercise of the power of appointment and the First assignment of error is that this construction violates the 14th amendment.

Second.—The Court of Appeals decided that children of David Dows, Jr., received vested remainders under their father's will on January 13th, 1897, and that the remainder being vested, the time of payment was controlled by the provisions of Section 222, that *"all taxes imposed by this article shall be due and payable at the time of the transfer,"* and not by the provision of Section 222 that *"taxes upon the transfer of any property or interest therein limited, conditioned, dependent or determinable upon the the happening of any contingent or future event by reason of which the fair market value thereof cannot be ascertained at the*

time of the transfer as herein provided shall accrue and become due and payable when the person beneficially entitled thereto shall come into actual possession or enjoyment thereof." The fourth assignment of error is that this construction violates the 14th Amendment, and this claim was raised before the Surrogate.

THIRD.—The Court of Appeals held that the character of the Trust Fund, whether Real or Personal Property, at the time of the exercise of the power of appointment by David Dows, Jr., 1899, determined its taxability and not its character in 1890, the death of David Dows, Senior. The Third Assignment of Error is that as Real Estate passing to lineal decendants is exempt, and as a large portion of the property was Real Estate, on the death of David Dows, Senior, in 1890, it must still be treated as Real Estate on the death of David Dows, Jr., in 1899, when he exercised the power, although it was actually personal property at that time, and that because the Court of Appeals did not so hold, the 14th Amendment was violated. No violation of the 14th Amendment was claimed on this point in the Court below and in the assignment of errors the claim was first made.

FOURTH.—The Court of Appeals held that as the tax was on the succession, certain stocks and bonds of corporations which were exempt from general taxation, could be appraised to determine the value of the succession. The Third Assignment of Errors claims this construction violates the 14th Amendment, but, although the claim that they should not be included was raised in the Courts below (Record, p. 22, Paragraph IV), it was not until the assignments of errors that the constitutional question was raised.

It was also claimed by the Third Assignment of Errors that certain Bonds were exempt from taxation, and that the act in question imposes a tax upon property and violates the obligation of a contract, and thus violates Section 10 of Article 1 of the U. S. Constitution (Record, p. 54, fol. 98). This constitutional claim

was raised before the Surrogate. The bonds have not been taxed, but appraised in determining the value of the succession.

POINTS.

I.

The decision of the Court of Appeals construing the act as imposing a tax on succession is binding on this Court.

(a) The Court of Appeals has construed this power of Appointment amendment as imposing a tax on succession at the time it vests in actual possession and not on property.

Matter of Vanderbilt, 163 N. Y., 597, affirming 50 App. Div., 246, on opinion below (Opinion in Record, pp. 38-42).
Matter of Dows, 167 N. Y., 227. (See opinion in Record, pp. 44-48.)

These opinions are exhaustive statements of the reasons of the Court and are not quoted from because printed in the Record. This construction of the law, and that it violates no provision of the New York Constitution, and, so far as that Constitution is concerned, deprives no person of a vested right is conclusive on this Court.

A large portion of Plaintiff's Brief is devoted to an attempt to prove that the statute imposes a tax on property and not on succession. That question, being one of construction of the act, is not open to argument in this Court.

(b) The decisions of a State Court upon the construction of its own Statute are final, and are adopted

by this Court, without regard to this Court's opinion upon its correctness.

The Gulf and Ship Island Railroad Company v. *Hewes, tax collector, etc.*, decided November 18, 1901, by this Court.

Commercial Bank v. ***Chambers,*** 182 U. S., 556.

First National Bank v. ***Ayers,*** 160 U. S., 660.

Aberdeen Bank v. ***Chehatis Co.,*** 166 U. S., 440.

People v. ***Weaver,*** 100 U. S., 539.

McElvane v. *Bush,* 142 U. S., 155.

Wood v. *Brady,* 150 U. S., 18.

State Railroad Tax Cases, 92 U. S., at page 617.

Bell Gap Ry. Company v. *Pennsylvania,* 134 U. S., 232.

In *Columbus Southern Railway,* v. *Wright,* 151 U. S., at page 475, the Court says:

> "Upon this writ of error we cannot of course review the construction which the Supreme Court has placed upon its own constitution and the law in question."

In *Pittsburgh, &c., Ry. Company* v. *Backus,* 154 U. S., at page 425, the Court says:

> "The decision of the Supreme Court of the State removes from this case, all question of conflict between the act and the constitution of the State, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights, which the Federal Constitution secures to the plaintiff."

In *Commercial Bank* v. *Chambers,* 182 U. S., 556, Justice White says: *"This construction of the Statute by the State Court is binding on this Court."*

> In the *First National Bank* v. *Ayers,* 160 U. S., 660, this Court held itself bound by the construction of the State Court that the definition of

"credit" in the Tax Act did not include shares of stock in banks, and that the owner could not deduct debts. The Court then discussed the question whether the act as thus construed violated the Federal Constitution.

In *McElvane* v. *Bush*, 142 U. S., at page Chief Justice Fuller says:

> "This Court follows the adjudication of the highest courts of a State in the construction of the statutes of that State."

Many more cases could be cited, and the above quotations are only made in view of the fact that so much of the Appellant's Brief is devoted to an attempt to prove, and to have this Court hold, that the tax in question is on property, which is in direct contradiction to the construction put upon this amendment by the Court of Appeals in the *Vanderbilt Case* and in this case, where they expressly hold the tax is not on property, but on the succession. Their construction must be adopted by the Court on this Appeal under all of the authorities.

The construction adopted by the Court of Appeals is in harmony with all of its previous decisions, which hold the tax to be one on succession and not on property.

Matter of Hoffman, 143 N. Y., 329.
Matter of Swift, 137 N. Y., 88.

Matter of Harbeck, 161 N. Y., 218.
Matter of Bronson, 150 N. Y., 6.
Matter of Merriam, 141 N. Y., 484.

In the *Matter of Harbeck*, 161 N. Y., at page 218, the Court says "the tax is not on property but on the right of succession."

In *Forsyth* v. *Hammond*, 166 U. S., at p. 518, Mr. Justice Brewer says:

> "The construction by the Courts of a State of its constitution and statutes, is as a general rule,

> binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That Court is the final arbiter as to such questions." (Citing many cases.)

In *Leffingwell* v. *Warren*, 2 Black., 599, 603, Justice Swayne says, at p. 603:

> "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute and is as binding upon the Courts of the United States as the text."

In the *Matter of Swift*, 137 N. Y., at page 88, the Court held the tax was on "the right of succession."

In the *Matter of Hoffman*, 143 N. Y., 327, the Court says "the tax is one upon the right of succession, levied upon the successors in respect to the shares to which they succeeded and not upon decedent's estate as such."

In the *Matter of Bronson*, 150 N. Y., at page 6, Judge Gray says, "The Inheritance Tax Act, or as it is known to-day, the Transfer Tax Act, imposes a tax upon the right of succession."

In *Matter of Merriam*, 141 N. Y., at page 484, Judge Bartlett says, "this tax is not imposed on property, but on the right of succession under a Will."

In the *Matter of Davis*, 149 N. Y., at page 546, the Court says, "it has often been held by this Court that the tax imposed is not a tax upon property, but upon the right of succession."

In *Matter of Knoedler*, 140 N. Y., at page 380, the Court says, "it taxes the right of succession to property and measures the tax in the method specifically prescribed (non taxable property can be included").

The same construction that the tax is on succession and not on property has been adopted by this Court.

Plummer v. *Coler,* 178 U. S., 115.
Murdock v. *Ward,* 178 U. S., 139.
Knowlton v. *Moore,* 178 U. S., 41.
United States v. *Perkins,* 163 U. S., 625.

In *Magoun* v. *Ill. Trust & Savings Bank,* 170 U. S., 283, this Court says, "an inheritance tax is not one on property but one on succession."

(*c*) The tax in this Case being on the succession as decided by the Court of Appeals, the question before this Court is not whether that construction is right, but whether the act as thus construed violates the 14th Amendment, as claimed by the plaintiffs in error. It is submitted it does not.

II.

The Fourteenth Amendment does not give this Court power to review an Act simply because the Appellants regards it as harsh.

A large portion of the Brief of the Plaintiffs in error attacks the law, because it is claimed to be harsh and unjust. It is, however, a fair law, as will be shown hereafter, and subjects to taxation successions, which through a fiction of relation, were escaping taxation. But even if it were as harsh as appellants claim, still that fact would not give the Court jurisdiction.

In *County of Mobile* v. *Kimball,* 102 U. S., 703, in speaking of taxation, this Court says:

> "But this Court is not the harbor in which the people of the city or county may find a refuge from ill-advised, unequal and oppressive State legislation. The judicial powers of the Federal Government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded. In all other cases, the

only remedy for the evil complained of rests with the people and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation so far as that is practicable and be more mindful than their predecessors of the public interests."

In *King* v. *Mullins*, 171 U. S., at page 436, Mr. Justice Harlan says:

> "The judiciary should be very reluctant to interfere with the taxing system of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property."

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., in speaking of an inheritance tax law, after citing many cases on equality of taxation, Mr. Justice McKenna says, on page 293:

> "With these for illustrations it may be safely
> "said that the rule prescribes no rigid equality
> "and permits to the discretion and wisdom of the
> "State a wide latitude as far as interference by
> "this Court is concerned. Nor, with the im-
> "policy of a law, has it concern. Mr. Justice
> "Field said, in Mobile County *v.* Kimball, 102 U.
> "S., 691 that this Court is not a harbor in which
> "can be found refuge from ill-advised, unequal
> "and oppressive State legislation. And he ob-
> "served in another case: 'It is hardly necessary
> "'to say that hardship, impolicy or injustice of
> "'State laws is not necessarily an objection to
> "'their constitutional validity.'"

In the *Sinking Fund Cases*, 99 U. S., 700, Chief Justice Waite said:

> "Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a *rational* doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

III.

In taxation "due process of law" is not violated, if the act provides for notice and an opportunity to object.

The Act before the Court amends the General Transfer Law, which act provides in Section 231 for notice to all parties interested. The Record shows all parties had notice; that they appeared and have contested the matter through all the Courts. They have not been deprived of property without "due process of law," and must base their claim on some other provision of the Amendment.

Winona, &c., v. *Minnesota*, 159 U. S., at page 537 and cases cited.
Palmer v. *McMahon*, 133 U. S., at page 669.
Simons v. *Croft*, 182 U. S., 427.
Davidson v. *New Orleans*, 96 U. S., 97.

IV.

The act does not abridge the privileges or immunities of citizens of the United States.

This provision of the amendment has no relation to taxation, but relates only to rights conferred by the national government.

Giozza v. *Tiernan*, 148 U. S., 657.
Bartmeyer v. *Iowa*, 18 Wall, 120.

In the first case, Chief Justice Fuller says, at page 661:

"The privileges and immunities of citizens of "the United States are privileges and immuni- "ties arising out of the nature and essential char-

"acter of the National Government, and granted
"or secured by the Constitution of the United
"States, and the right to sell intoxicating liquors
"is not one of the rights growing out of such citi-
"zenship. Bartemeyer *v.* Iowa, 18 Wall., 129."

V.

"Equal protection of the laws," does not prohibit classification for taxation, provided the classification is reasonable, and all within the same class are treated the same under like circumstances.

The whole subject of "equal protection of the laws" has been so recently examined by this Court in reference to Inheritance Taxes, that an extended reference to authorities is unnecessary.

In *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S., 283, Mr. Justice McKenna says:

> "What satisfies this equality has not been and
> "probably never can be precisely defined. Gen-
> "erally it has been said that it 'only requires the
> "same means and methods to be applied impar-
> "tially to all the constituents of a class so that
> "the law shall operate equally and uniformly
> "upon all persons in similar circumstances.'
> "Kentucky Railroad Tax Cases, 115 U. S., 321,
> "337. It does not prohibit legislation which is
> "limited, either in the objects to which it is di-
> "rected or by the territory within which it is to
> "operate. It merely requires that all persons
> "subjected to such legislation shall be treated alike
> "under like circumstances and conditions, both
> "in the privilege conferred and the liabilities im-
> "posed." * * * "The rule, therefore, is
> "not a substitute for municipal law; it only pre-
> "scribes that that law have the attribute of
> "equality of operation, and equality of operation,

"does not mean indiscriminate operation on per-
"sons merely as such, but on persons according
"to their relations." * * *

After reviewing many cases, the Justice says:

"Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the Bell's Gap Railroad *v.* Pennsylvania, 134 U. S., 232, and Mr. Chief Justice Fuller in Giozza *v.* Tiernan, 148 U. S., 657, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley as follows: 'It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State framing their constitution."

"And so Mr. Justice Miller, speaking for the Court in Davidson *v.* New Orleans, 96 U. S., 97, 105, said: 'The Federal Constitution imposes no restraints on the State in regard to unequal taxation.'

"The Court, through Mr. Justice Lamar, in Pacific Express Co. *v.* Seibert, 142 U. S., 339, was equally emphatic. He said, on page 351: 'This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens."

> "And it was said in Merchant's Bank *v.* Pennsylvania, 167 U. S.: 'Indeed, the whole argument of a right under the Federal Constitution, to a challenge of the tax law on the ground of inequality in the burden resulting from the operation of the law is put at rest by the decision in Bell's Gap Railroad v. Pennsylvania.'
>
> "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so."

In *Giozza* v. *Tiernan*, 148 U. S., 657, Mr. Chief Justice Fuller, speaking for this Court, sums up the whole subject of "equal protection of the law" as follows:

> "Nor in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. *It is enough that there is no discrimination in favor of one as against the other of the same class.* Bell's Gap Railroad *v.* Pennsylvania, 134 U. S., 232; Home Insurance Co. *v.* New York, 134 U. S., 594; Pacific Express Co. *v.* Seibert, 142 U. S., 339.

VI.

The object and effect intended to be accomplished by the addition to the Taxable Transfer Law of the Power of Appointment Amendment and that it in no way violates the Fourteenth Amendment.

(*a*) It is conceded that the succession taxed falls within the direct provisions of the amendment, which is as follows:

> "*Taxable Transfers.* A tax shall be and is hereby imposed upon the transfer of any property

to persons not exempt by law from taxation on real or personal property, in the following cases:

"1. When the transfer is by will from any person dying seized or possessed of the property while a resident of the State.

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made *either before or after the passage of this act*, such appointment *when made* shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

By Section 221 the rate is 1% where the transfer is to a child or lineal descendant of a decedent.

David Dows, Jr., exercised, after this act was passed, a power of appointment derived from the disposition of property made before the passage of the act (viz., derived from the will of David Dows, Sr.). The case, therefore, falls within the direct provisions of the Act, which then provides that the effect of such appointment shall be deemed a transfer taxable under the provisions of this Act in the same manner as though the trust fund to which such appointment relates belonged absolutely to David Dows, Jr., and had been bequeathed by him by will. The Act places the succession to the trust fund, so far as the tax is concerned, upon the same footing as though it had belonged absolutely to David, Jr., and had been bequeathed as his property by his will. Had David, Jr., been the absolute owner of the trust fund and bequeathed it by his will to his children, would the transmission of this property be taxable? That it would be, is not open to question. This Act places the property passing under the exercise by David, Jr., of the power of appointment upon the same footing as though the property belonged absolutely to him. It certainly cannot be doubted that it was the intent of the Legislature to subject to taxation the succession to property passing

under a power of appointment, as this trust fund passed, and that this purpose has been accomplished by the language used.

The plain intent of this enactment was to change for the purpose of taxation the rule of the common law, that when a power was exercised it was deemed to relate back to the date of the original instrument creating the power. The effect of this fiction of relation, which had been given full force and effect by the Surrogate's Courts, as well as by the Court of Appeals (see Matter of Stewart, 131 N. Y., 274; Matter of Langdon, 153 N. Y., 9, and Matter of Harbeck, 161 N. Y., 211), in tax matters, had been that a large amount of property had escaped taxation, although actually vesting in possession after the passage of the Transfer Laws, under a transfer made by the donee of the power, which in reality and substance gives the grantee the property, and changes the possibility he had before into a vested estate. It was well known that many old wills contained such powers, and that unless the law was changed these dispositions under the fiction of relation would escape taxation. To remedy this evil, the law in question was passed, the intent of which, so far as taxation is concerned, was to break down this fiction and substitute the truth instead, and treat the succession as accruing when it actually does in fact; viz., when the beneficiary actually receives the possession of the property and becomes vested with it. That such is the result of the amendment of 1897, does not seem to be open to question, and it is just and fair. Why should a possible appointee of a power, who, up to the time the power is exercised, has a possibility of no value and no vested interest, not pay a tax upon the appointment or transfer, which actually gives him a vested interest of great value? It is this act which gives him something of value, whereas before he had nothing of value. Why should he escape taxation on the succession consummated and made valuable for the first time by this act, through the ancient fiction of relation, when other persons, receiving under the same will less valuable interests, must pay the tax. The amendment makes

the Transfer Tax Law uniform and fair in its operation by imposing the tax upon all valuable interests received under the will.

The Court of Appeals in *Matter of Harbeck* (*supra*), which arose before the amendment of 1897, held that by reason of the doctrine of relation, no tax could be collected because the power when exercised related back to the time of the instrument creating the power, and that no provision of the Act as then existing covered such a case. That the decision would have been different, if the amendment of 1897 had been in force, is clear, from the opinion of the Court, and under such circumstances the doctrine of relation would not apply and the succession would be taxable. The *Harbeck* case simply decides that, without the Act of 1897, the succession to this trust fund would not be taxable, and all of the exercise of the power and its relation back to the original instrument, is simply a statement of the law before the amendment of 1897. That Act changes the law in cases where the donee of the power dies after its passage, by providing in substance that the doctrine of relation shall not apply and that for the purpose of taxation the truth shall prevail, and the person shall be deemed to receive, within the provisions of the Act, a taxable transfer of property at the time the donee exercises the power, as before that time no possible appointee was able to say he was entitled absolutely to one dollar of the trust fund.

This is just and fair. The act of the donee, by which a possibility is turned into a vested estate of great value, is made for taxation the taxable transfer, and a fiction, which prevented this just and fair result, is abrogated so far as taxation is concerned.

A person has no vested right in a rule of the common law and it can be changed without violating the Fourteenth Amendment.

Munn v. *Illinois*, 94 U. S., at p. 113.

Cooley's Const. Limitations, 5th Ed., at p. 440.

State Railroad Tax Cases, 92 U. S., at p. 607.

(See extracts at end of next point.)

A fiction can be abrogated without violating the Fourteenth Amendment; for example, that the "*situs* of a debt follows the domicile of the owner."

Bristol v. *Washington County,* 177 U. S., 133.
Pullman Pal. Car Co. v. *Penn.,* 141 U. S., 427.

(*b*) The Succession Law can be made retroactive, if the law clearly shows that it was intended to apply to past successions.

Carpenter v. *Pennsylvania,* 17 How., 456.

The original succession law of Pennsylvania applied only when the property which passed *was within the State.* In 1850 an act was passed in which it was stated that the law was intended to apply to the estates of all persons, who at the time of their decease *were domiciled within the commonwealth.* William Short, a citizen of Pennsylvania, died a few months before the passage of the amendment, leaving property outside of the State, to which the original act would not apply, but to which the amendment did. The Supreme Court of Pennsylvania held that the tax could be collected and this decision was affirmed by the Supreme Court of the United States. It was claimed that the rights of the residuary legatee vested on the death of the testator and that the extension of the original act by the amendatory law to a succession already in the course of settlement involved an arbitrary change of the existing laws of inheritance to the extent of this tax, and in the sequestration of that amount for the uses of the State. In overruling these objections the Court says at page 462:

> "The rights of the donee are subordinate to the conditions, formalities and administrative control prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle n the constitution and laws of the United States to prevent it."

So, also, the Federal Succession Tax of 1864 was imposed on the disposition of real estate, past or future, by will where any person became beneficially entitled in possession or expectancy to real estate after June 30, 1864, and it was held that where the property was devised before the passage of the act to one for life, remainder to another, and the tenant for life died after the Act went into effect, the tax accrued on the interest of the remaindermen on the death of the life tenant.

Wright v. *Blakeslee,* 101 U. S., 174.

So, also, under the English Succession Duty Act of 1853 (16 and 17 Victoria, Chap. 51) the tax was imposed upon either past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person dying after the time appointed for the commencement of the Act and it was held under this Act that where a person actually obtained the possession of property by reason of the death of a life tenant occurring after the Act the succession was subject to the tax, although the rights of the person taxed accrued by reason of a will which had taken effect prior to the passage of the Act.

Wilcox v. *Smith,* 26 L. J. Ch., 596.
Atty. Genl. v. *Lord Middleton,* 3 H. & N., 125.

The *Matter of Seaman,* 147 N. Y., 69, has no bearing on this case. The persons were not taxed under powers of appointment, but took vested estates in expectancy. The Court simply decided there was nothing in the Act as then existing to show the Legislature intended it to be retrospective, *but not that an Act could not be made retrospective.* Here the intent to apply the Act retrospectively is too clear to admit of argument.

The Act of 1897 was intended by its express terms to cover just the case, which has arisen under the will of David Dows, Senior, and to subject such successions to taxation, when the beneficiary actually receives in possession a portion of the property.

But even if such an Act could not interfere with vested rights, no child of David Dows, Jr., prior to his death had any vested right in the trust fund. Their father had a discretionary power of appointment over the fund. None of his children could complain of the way he might exercise this power or claim one dollar in the trust fund until David Dows, Jr., had designated by his will the portion each was to have. At that time, and not before, each child received a vested interest in the original trust fund, as shown in the next point, and as decided by the Court of Appeals in the Vanderbilt case (Record, p. 42), and reaffirmed in this case.

VII.

Under the will of David Dows, Senior, the children of David Dows, Jr., as the possible appointees of the power given their father, acquired no vested succession, interests or rights, and these did not vest until their father exercised the power in 1899, and before that time the Power of Appointment amendment of 1897 had imposed a tax on such succession. This in no way violates the Fourteenth Amendment.

(a) It is asserted throughout the Appellants' Brief that upon the death of David Dows, Senior, his grandchildren received under his will vested rights. This is a misconception, so far as their rights as the possible appointees of the power is concerned. It is only their rights as such appointees that is involved on this appeal, because the power was exercised by their father and the right to tax them on the exercise of the power,

not its non-exercise, is before the Court. As such possible appointees they received no vested rights, but simply a possibility or chance that their father might exercise the power in their favor. Their grandfather's will vests the estate in his executors and trustees during the life of David Dows, Jr., who had a discretionary power of appointment in favor of such of his children and their issue as he might select. David Dows, Jr., under the power could give the entire estate to one child and exclude the rest; or if a child died, he could give the entire estate to this child's issue, excluding all his own children; or if he had a child born after the death of David Dows, Senior, he could give all to this child to the exclusion of those living at the death of David Dows, Senior. Under these circumstances what would become of the vested rights of those who get nothing on the exercise of the power? David Dows, Jr., had unlimited discretion as to the division of the fund among such of his children and their issue as he might select. A possible appointee under such a discretionary power acquired at most a simple chance or possibility that he might get something. The appellants call this a vested estate in the children! A child did not take under the will of David Dows, Senior, any estate or interest, legal or equitable, in possession or expectancy, in the property subject to the power. He had nothing which he could sell, devise, or that would descend to his heirs. Neither could he complain of the way his father might dispose of the property under the power. The fact that a child, as the possible appointee of the power, had nothing that he could sell, or that would pass under his will, or descend to his heirs, shows that a child received under his grandfather's will no vested estate, even in expectancy, because under the New York Statutes vested expectant estates are alienable, devisable and descendible (*Moore* v. *Little,* 41 N. Y., 66), and if real estate can be taken in payment of debts (*Sheridan* v. *House,* 4 Keyes, 569). The fact that a child, the possible appointee of the power, could not complain of the way their father might exercise the power, shows that he re-

ceived no vested estate or succession, either in possession or expectancy, at the time of the death of David Dows, Senior. If the child had a vested estate he could complain, for the New York Revised Statutes expressly declares that an expectant estate shall not be diverted by any holder of the prior estate.

(b) *The fallacy of Appellants' argument as to the "vested estate" of the grand-children.*

Appellants contend that under *Campbell* v. *Stokes*, 142 N. Y., 23, the grand-children had, at their grandfather's death, a vested right to future enjoyment of the estate. Nothing in that case supports the theory that possible appointees of the discretionary power have a vested right to receive anything. It is perfectly clear, upon the authorities hereinafter cited and upon principle, that they had nothing but possibilities and chances, until the power was exercised by their father in 1899, when for the first time they received v[illegible] rights.

That case has no application, except possibly to those portions of the will which relate to the rights of the grandchildren in case the power is not exercised. Those provisions are not before the Court, because the power was exercised and they are taxed upon the succession they received by reason of its exercise and not because of its non-exercise. Appellants' whole argument is based upon the theory that the children received vested interests on their grandfather's death, and he makes no distinction between their rights as possible appointees, which are mere possibilities, and chances, and their rights in case the power had not been exercised. Possibly in this latter case their rights may have been vested rights, liable to be defeated. Even this is extremely doubtful, because the will of David Dows, Senior, is carefully drawn and from the extracts in the Statement of Facts on this Brief, it is evident that he uses the word "vest" with great carefulness and legal precision. First, he provides his entire estate shall "vest" in his executors, and then *on the death* of his son David, Jr., he pro-

vides for the first time it shall vest in others. The estate is *vested* in executors until the death of David, Jr., and not until his death do the grandchildren receive vested interests in any portion of the estate; even in those portions they would have received had the power not been exercised. The appellants confuse the Court by not distinguishing between the rights which these children received as possible appointees of the discretionary power of appointment, and their rights in the estate in case the power is not exercised. Even if the latter case can be called vested rights certainly the former cannot be. This appeal only concerns their rights as possible appointees of the discretionary power, and these at their grandfather's death were mere possibilities or chances and not vested rights. Appellants' entire argument based upon the vested rights of these children on their grandfather's death has not the most remote bearing on the question before the Court, because until David Dows, Jr., exercised the power in 1899 the children had no vested rights, but simply chances or possibilities. If this distinction between the rights of the children on their grandfather's death as possible appointees of the discretionary power and their rights in case the power is not exercised is borne in mind, most of appellants' attack on the constitutionality of the Act falls to the ground.

The grandchildren are taxed in this proceeding for the succession, consummated by the exercise of the power of appointment, and only that portion of the act, which relates to the exercise of the power of appointment, is before this Court. What their rights would be, had the power not been exercised, and whether they vested on their grandfather's death or not, is immaterial, so far as the decision of this case is concerned. Certainly, as possible appointees of the discretionary power, they received, on the death of David Dows, Senior, no vested interest, and even if, under the clauses of the will providing for the distribution of the estate on the non-exercise of the power, they received vested interests to future enjoyment, is immaterial, for we are not seeking to tax those interests. If those portions of the will had

taken effect, the amount of the tax and the character of the taxing order would have been very different, because it is shown in the statement of facts that the amounts they would have received and the time when received vary greatly from what they received when the power was exercised, and for which they are here taxed. Any possible interest under these clauses, vested or not, were defeated on the exercise of the power by their father. If the power had not been exercised, possibly different questions would have arisen, but, it was exercised, so those questions are not before the Court, and do not aid in the determination of the question raised in the Record.

This was expressly held by the Court of Appeals in its decision, printed at fol. 83 of the Record, and is in harmony with the decision of this Court in *Packet Co. v. Keokuk*, 95 U. S., 89, where the Court says:

> "To the extent which they are affected by it "there is no valid objection to it. Statutes that "are constitutional in part only, will be upheld "so far as they are not in conflict with the Con- "stitution, provided the allowed and prohibited "parts are severable. We think a severance is "possible in this case. It may be conceded the "ordinance is too broad, and that some of its pro- "visions are unwarranted. When those pro- "visions are attempted to be enforced, a different "question may be presented."

The possible cases of double taxation suggested at pp. 45 to 47 of the Appellants Brief could not occur. The succession created by the exercise of the power would be taxed under Sub. 5, the power of appointment amendment, which was passed for that express purpose, and the State would claim the tax under that subdivision. Sub. 4 relates to the taxation of transfers, like those in Matter of Roosevelt, 143 N. Y., 120; Matter of Curtis, 142 N. Y., 219, and Matter of Hoffman, 143 N. Y., 327, which do not arise out of powers of appointment, but where owing to contingencies the transfers cannot be appraised at decedent's death. The two sub-divisions relate to different cases, and it

would seem proper to wait until the State claims the tax under both subdivisions from the same person, for the same transfer, before deciding whether it could be done. It is not raised by the present Record.

(c) *The authorities showing that the interest and succession of the children of David Dows, Jr., as possible appointees of the power, vested, not on the death of their grandfather, but on the exercise of the power by their father in 1899 and that the Fourteenth Amendment was not violated by taxing the succession created by the exercise of the power.*

(1) The title may be derived from the act creating the power, but the *time of vesting of the right* is the time of the execution of the power by David Dows, Jr., in 1899.

Matter of Vanderbilt (Record, p. 42).
Matter of Stewart, 131 N. Y., 274.
Sugden on Powers (8th ed.), Ch. 9, Sec. 3, Subd. 3.
Duke of Marlborough v. *Lord Godolphin*, 2 Ves. Sr., 61.
Southby v. *Stonehouse*, 2 Ves. Sr., 612.
Jackson v. *Davenport*, 20 Johns., 537.

In *Sugden on Powers*, (*supra*), the learned writer says:

> "It has been contended that the acts done in consequence and by virtue of an authority and pursuant thereto are the acts of the old proprietor, and OF THAT DAY WHEREIN HE IN VIRTUE OF HIS OWNERSHIP DELEGATED THAT AUTHORITY; BUT THIS LORD HARDWICKE OVERRULED."

In the *Matter of Stewart*, 131 N. Y., 274, under the will of Mrs. Stewart, Henry Hilton had a right to appoint a portion of the property among the legatees mentioned in Mrs. Stewart's will. Judge Andrews says, at page 279:

"It is doubtless true that Charles J. Clinch at

the death of Mrs. Stewart *took no legal interest in the trust fund given to Hilton.* * * * Until the power had been exercised no one of the class could maintain that he was entitled to any part of the fund. It is very clear that there was no basis for fixing a tax on the death of Mrs. Stewart on the mere possibility which Charles J. Clinch had that the power of appointment might be exercised in his favor. * * * The possibility however became a certainty when on the 16th day of January, 1890, the donee of the power of appointment exercised it in favor of members of the class mentioned in the will, and set apart to Clinch a tenth part of the trust fund. *To the extent of such application Clinch became vested as of that date with an interest in the estate of Mrs. Stewart.*"

In *Duke of Marlborough v. Lord Godolphin*, 2 Vesey, Sr., 61, the Earl of Sunderland by his will gave the use of £30,000 to the Countess (Lady Sunderland) for life, and after her decease to be divided and distributed to and amongst such of his children, and in such manner and proportions as she by any deed or will should direct and appoint. By her will she appointed £2,000 to John Spencer, and £15,000 to Lady Morpeth, children of the Earl of Sunderland, who were alive at their father's death, but who died in her lifetime after the making of her will; it was contended that the usual rule, that legacies lapse on the death of the legatees before the testator, did not apply, owing to the same doctrine of relation, but it was held that the legacies lapsed.

Lord Chancellor Hardwicke says (at p. 78):

"I admit the principle, that where a person takes by execution of a power, whether of realty or personalty, it is taken under the authority of that power; *but not from the time of the creation of that power. There is no case, that the relation shall go back for that, which is quite of another nature; and that is the point which must be contended for here, that they must take by relation so as to make them take from the time of the creation of the power; for which there is no authority; and that would be unreasonable.* * * * *This, therefore, is not a relation so as to make things vest*

from the time of the power, but according to the time of that act executing that power; not like the referring back in case of assignment in commission of bankruptcy; that is, by force of the statute, and to avoid mesne wrongful acts. * * * Consider the consequence if this was otherwise; that by such a will or instrument in nature of a will, executing such a power, anything should be held vested in testator's life, and that the reference to the power should not only be a reference to the substance of the power, but to the time of creation; it might be as well said, that Lady Sunderland might have appointed this money to them if they had died before her making the will; for it is just the same thing; * * * "

In *Southby* v. *Stonehouse*, 2 Vesey, Sen'r, 612, Chancellor Hardwicke, in laying down the rules which should govern the Court in the construction of a will made in execution of a power, and of the rights of the legatees thereunder, says (p. 612):

"Next, if they (the legatees) do survive the testator; thirdly, they can take only from the time of the death of the testator; that is the consummation of the writing; and then *they do not take as from the time of the power, but the operation and effect is only to take and vest the estate from the time of the consummation of the act by the death of the testator.*"

In *Johnson* v. *Davenport*, 20 Johns. Rep., 537, the Chancellor cites with approval (on p. 552) the decisions of Lord Chancellor Hardwicke in the above cases, and says:

"The title is derived from the act creating the power, *but the time of vesting of the right is the time of the act of execution of the power.*"

And in speaking of this distinction he says:

"And I am greatly mistaken if this be not the plain common-sense and manifest justice of the thing. Any other construction would lead to fraud and intolerable abuse."

Under all of these authorities the interest of each of the children of David Dows, Jr., in the trust fund, which is to be taxed in this proceeding, vested on the

death of their father, David Dows, Jr. If the Transfer Law was the same as it was at the time the Harbeck case was decided, it would be held that, so far as the imposition of a tax was concerned, when this property did vest it was deemed to relate back, but there could be no relating back after the vesting in this case, because, before it vested on the death of David, Jr., the legislature had passed the amendment of 1897, which provided that in this class of cases there should be no relating back for the purpose of the succession tax, and that so far as taxation of the succession to property under powers of appointment is concerned, the old common-law fiction of relation should be abrogated, and that the succession should be deemed to accrue at the time each legatee actually receives his property. The children of David, Jr., have, therefore, been deprived of no vested right by the legislation in question. They had none at the time the Act was passed and did not have until several years thereafter.

(d) *They certainly could have no vested right in this fiction of relation of the common law and in abrogating it the Fourteenth Amendment was not violated.*

The Legislature always has the right to change the common law, and when it does, the statute and not the common law must prevail.

This is especially true in cases of taxation. The common law rule is well settled that the "situs" of bonds and securities follow the domicile of the owner. That rule is more firmly established even than that contended for by appellants that all the appointee's rights come from the donor of the power. Nevertheless, this Court has held in many cases that the fiction could be abrogated, and that securities of non-residents could be taxed where physically present.

The Common law says the securities are out of the State, the tax statute says they shall be treated as property in the State for purposes of taxation. Arbitrary and unconstitutional according to appellants' argu-

ment, but as this Court holds, no violation of the constitution.

Bristol *v.* Washington County, 177 U. S., 133.
New Orleans *v.* Semple, 175 U. S., 309.
Pullman Palace Car Co. *v.* Penn., 141 U. S., 427.

No one has vested rights in rules of the Common law. As this Court says in *State Railroad Tax Cases* 92 U. S., in speaking of the rule that the situs of debts follow the domicile of the owner, at page 607:

> "But, after all, the rule is merely the law of the State which recognizes it. * * * Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

As Chief Justice Waite says in *Munn* v. *Illinois*, 94 U. S., at page 113:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In *Cooley's Constitutional Limitations*, 5th Ed., at page 440, the author says:

> "First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a

demand, or a legal exemption from a demand made by another."

All the right that any child of David Dows, Jr., had at the death of David Dows, Senior, was a possibility that his father might give him some portion of the trust fund, and an expectation that, if the tax law was not changed, he might not be compelled to pay any taxes, but these, as we have seen, did not constitute any vested right or interest in any one of the children, and before one dollar of the trust fund vested in any one of the legatees, the law had been changed and a tax imposed upon the succession.

The possibility of each child that he might receive some portion of this trust fund was certainly no more a vested right, than is the inchoate right of dower of a woman after marriage, when her husband is actually seized of the property, and nevertheless the authorities are uniform that she is deprived of no right by statute which abrogated the right of dower under such circumstances.

Randall v. *Krieger,* 23 Wall., at p. 148.
Moore v. *Mayor,* 8 N. Y., 110.

Neither is the right of these children any greater than was the right of a man on marriage to become the absolute owner of all his wife's personal property, and nevertheless the courts have held uniformly that the Legislature could change this common-law rule, and that in so doing the husband is deprived of no rights, where the property is not actually vested in possession prior to the repealing laws.

In Baker's Executors *v.* Kilgore, 145 U. S., 487, Mr. Justice Harlan says, at page 490:

"We do not doubt the validity of the act of 1879, as applied to the judgment previously rendered against Scruggs. The particular profits of the wife's estate here in dispute had not, when that act was passed, come to the hands of the husband. They were not, at that time, in existence, nor in any legal sense, vested in him. Nor were they ever vested in him. He had a mere expectancy

with reference to them when the act was passed. Moreover, his right, prior to that enactment, to take the profits of his wife's estate did not come from contract between him and his wife or between him and the State, but from a rule of law established by the legislature, and resting alone upon public considerations arising out of the marriage relation. It was entirely competent for the legislature to change that rule in respect, at least, to the future rents and profits of the wife's estate. Such legislation is for the protection of the property of the wife, and neither impairs nor defeats any vested right of the husband. * * * If the act of 1879 did not infringe any vested right of the husband, much less did it infringe any right belonging to his creditors."

These cases all show that the Legislature had the power to pass the Power of Appointment amendment, and subject to taxation these successions under power of appointment, and that in so doing it violated no vested rights of the children of David Dows, Jr., and no provision of the Fourteenth Amendment.

VIII.

Equal protection of the law is not violated by the Power of Appointment Amendment, because it does not create a mere arbitrary classification and treats all persons alike under like circumstances and conditions.

The provisions of the 14th Amendment, which prohibits any state from denying to any person within its jurisdiction, the equal protection of its laws, as applied to the subject of taxation, require, as we have seen, that all taxations shall be equal and uniform, in respect to all persons, under like circumstances and conditions.

To determine whether the act is uniform and equal,

it is necessary to ascertain the sphere of operation of the act. If within the sphere of operation it affects all persons equally and uniformly under like circumstances and conditions, it is not obnoxious to the provision of the constitution. But on the other hand, if it creates a burden on some persons and not upon others, under the same circumstances and conditions, it violates this constitutional provision. It cannot be denied that the Legislature may classify subjects for the purpose of taxation, provided it does so, not arbitrarily but owing to an intrinsic difference of circumstances and conditions.

It is argued there is an unjust discrimination between the persons taking under the power of appointment, in favor of those who may have, under other circumstances, received property under the original will.

The fallacy of the argument lies in the assumption that the two transfers arise under like circumstances and conditions. The difference in the nature of the transfers admit of difference in classification.

The act in question does not divide persons, receiving a transfer under the same conditions and circumstances, into different classes, and subject one to taxation and the other not. It treats all of the same class alike and makes the succession of each taxable. Its object was to subject to taxation those incomplete successions, which under the original act were escaping taxation. The act making the exercise of the power the transfer or the taxable succession does not, by an arbitrary definition, impose upon certain persons taxes from which other persons under the same conditions are exempt. Each and every person receiving property under the exercise of a power of appointment is taxable in the same way and at the same rate. The act is therefore uniform and equal in its operation.

The legislation, by making the exercise of the power a transfer and by subjecting persons taking under its exercise to a succession tax, cannot be considered as invidiously discriminating against persons thus receiving their vested interests under the exercise of the power, in favor of persons who received at the time of the original testator's death a legacy of a certain amount,

which vested and was actually received in their possession at that time. The circumstances and conditions of the two classes are very different, and there is an essential difference between the rights of successions received by each class. The one class received a completed succession at the original decedent's death, and the property was theirs absolutely at that time to do with as they wished. No one against their will could take it away from them. They could sell it, devise it, or, on their death, it would pass to their heirs. On the other hand persons taking under a power had at the most but a possibility or a chance that they might get something, if their influence with the donee of the power was sufficient to get him to exercise the power in their favor. They had nothing they could sell, devise or that would pass to their heirs. The act of the donee of the power made the succession complete, and was the vital act giving force and effect to the transfer, and on its exercise the possible appointee first acquired the property and a valuable succession. In the nature of things there is no similiarity between the two classes of cases. They belong to different classes and the legislature in making a discrimination between them, violates no rule of classification. The different nature and character of the successions justify the classifications which the legislature has made. There is no discrimination between persons brought within the class defined in the act. The successions of such persons, being so entirely dissimilar, in vital respects, from that of other persons, whose rights vested absolutely on the death of the creator of the power, that there is no violation of equality and uniformity of taxation.

The classification is based upon reasonable grounds, and upon a difference which bears a just and proper relation to the attempted classification; and is not a mere arbitrary selection. As previously shown, prior to the exercise of a power of appointment, the possible appointee had no vested right in the property and did not have the right to one dollar of it. The will of the donee executing the power, as a matter of fact gave him fixed rights to a large fortune. To prove he was entitled to any part of the trust fund, he must resort to

the will executing the power, and to the transfer thus made, which was valuable to him. There is nothing unreasonable in declaring that this transfer, and his relationship to the person who makes it, shall be the taxable succession. It taxes with reference to the person who, as a matter of fact and without regard to legal technicality, actually gives the valuable right. The amendment of 1897 simply puts the truth in place of fiction, for as the Court of Appeals says in the case:

> "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives the grantee the property passing under it."

The arguments and cases cited in the previous points show the peculiar character of transfers created by the exercise of a power of appointment, and support the argument, that, by taxing such transfers, no unjust and arbitrary classification is made, and show that a classification based on such transfers is reasonable and violates no provisions of the Fourteenth Amendment.

(b.) Whether the relationship to the creator of the power, and not to the person executing it, should determine the rate of tax, is not raised on this appeal. In either case the persons taxed in this proceeding would only pay at the rate of 1 %, and if other persons might have to pay more, as the rate is determined by reference to one or the other, is no concern of the appellants. They are not injured.

Supervisors v. *Stanley*, 105 U. S., 310.

IX.

The provisions of the Transfer Tax Law for the collection of the tax, do not violate the Fourteenth Amendment.

(*a*) The method of collection provided by the act affects all transfers.

§222 provides, "all taxes imposed by this article shall be due and payable at the time of transfer, except as hereinafter provided." The act then provides in the same section that taxes upon the transfer of estates which are contingent so that the fair market value cannot be determined at the time of transfer shall be due and payable when the person beneficially entitled thereto shall come into the actual possession or enjoyment thereof.

The Court of Appeals held and the appellants admit (see their Brief, p. 54) that they fall within the first class and that the transfer occurred when the power was exercised on January 13th, 1899. This construction of the statute by the State Court is binding on this Court.

§223 provides for a rebate of 5%, if the tax is paid within six months, but if not paid until eighteen months they shall bear interest at 10% per annum, which, for certain reasons, can be reduced to 6% per annum. §222 makes the tax a lien on the property transferred until paid, and the person receiving the transfer and the executor and trustees personally liable for the tax. §224 gives the executor power to sell enough of the property to pay the tax; and power to collect it from the legatee, and §226 of the act authorizes the taxpayer or the executor to give a bond to pay the tax and interest, if they wish to postpone its payment until the property is actually received in their physical possession.

The values of the remainder of the children of David Dows, Jr., have been valued, as of the date of the transfer, January 13th, 1899, by deducting the

value of the prior life estates as provided for by §230 of the act. The tax on the present worth value of these remainders has been ascertained, and the Court of Appeals, construing the different provisions of the act, has held the taxes were due at the time of the transfer, viz., January 13th, 1899.

Appellants' claim is that if they neglect to pay the taxes for a number of years the penalty will amount to a large sum, and therefore the 14th Amendment is violated.

These penalties can all be avoided by the prompt payment of the tax. If they don't pay them it is their own fault, and therefore the alleged unconstitutionality would arise, not out of the act itself which is uniform, and affects all alike, but out of the way the appellants voluntarily use the act. The supposed cases stated in their brief are of no weight, arising as they do from the voluntary act of taxpayer, and it is difficult for us to see how they can ever arise. The record does not show they have arisen in this case.

> *"The infliction of penalties for non-payment of taxes is a usual and legitimate mode of compelling prompt payment of taxes and the amount of the penalty is within the legislative discretion and does not violate the 14th Amendment."*
>
> *Western Union Telegraph Co.* v. *Indiana*, 165 U. S., 307.

(b) The basis of the appellants' argument seems to be that it is a hardship for a remainderman to pay the tax before he receives the physical possession of his remander, but hardship alone does not make an act unconstitutional, and in the *State Railroad Tax Cases*, 92 U. S., at p. 605, Mr. Justice Miller says, "but individuals do not escape taxation on their real and personal property because insolvent."

(c) In what respect the 14th Amendment is violated by these provisions for collecting taxes which apply to the collection of all taxes on vested estates, it is difficult to see. If penalties for the non-payment of taxes

could not be put in Tax Acts, then the taxes never would be paid.

The remainders are not contingent or liable to be defeated in any way, but are absolute vested remainders. Th order virtually makes the tax accrue on January 13th, 1899, and this is right. The act says the tax shall accrue on the transfer of the property and these remainders were transferred and vested absolutely on the day fixed, January 13th, 1899. The remaindermen are only taxed on the present worth value of these remainders, and not on the amount they will eventually receive. The value of the remainders have been ascertained by deducting the value of the life estate, so that the remainderman is only taxed on the present worth value of the remainder. No exception is taken to this valuation. There is no reason why the payment of the tax should be suspended, which is only done when owing to some contingency or the happenng of some event, it is impossible to ascertain who will ultimately receive the estate. There is no uncertainty in this case, because on the death of David Dows, Jr., each of his sons received by virtue of the appointment this vested remainder. He could sell it, or devise it by his will, and, on his death intestate, it would pass to his next of kin. To be sure the tax on the present value of the remainders accrued on January 13, 1899, and if not paid within the time fixed by the Statute would bear interest.

The question of how the tax shall be paid and out of what funds, is not before the Court, but there is no difficulty about the Trustees paying the Tax. The act says that they can collect it from the beneficiaries. Each remainderman has the income of one-third of the entire estate. The trustees have this income of each remainderman in their possession, and can pay the tax fixed on each child's life estate and remainder out of that child's income. There is no objection to this. Each child's property is used to pay his own tax. If the Trustees do not wish to pay the tax until the remaindermen actually enter into possession of their remainders, they can give a bond as provided in §226 of the Act to

pay the Tax and interest from its accrual. There is no occasion for so doing, because as previously shown, they have in their possession money of the remaindermen, which they can use for the payment of the tax. If the Trustees do not wish to use a child's income to pay that child's tax, the Act gives them the power to sell enough of the remaindermen's interest in the Estate to obtain the necessary money. Each child's interest in remainder vested absolutely on the death of their father, on January 13th, 1899, as stated in the order. There was no contingency about the remainders, but they were absolute legal estate, and not liable to be defeated by any contingency. Their father's Will so provides (fol. 63). Each remainderman could immediately sell his remainder interest, or could devise it by his will, and, on his death intestate, it would pass to his next of kin. Each child's remainder interest vested absolutely on the death of their father on January 13th, 1899, and there is no constitutional objection against the State imposing the tax upon the interest at the time it vests.

X.

The Fourteenth Amendment is not violated by the decision of the Court of Appeals, that the Trust Funds being personal property when they vested in the children of David Dows, Jr., in 1899, by their father's exercise of the power of appointment, that succession is taxable, even if the Trust Funds were real estate when David Dows, Sr., died in 1890.

It is claimed that because a large portion of the property passing under the Will of David Dows, Senior, to his Trustees, in 1890, was Real Estate, and because

the proceeds of this Real Estate comprised a large portion of the personal property passing to the children of David Dows, Jr., by his exercise of the power of appointment, in 1899, that this personal property, so passing and vesting in the children under their father's Will in 1899, cannot be appraised, because Real Estate passing to lineal descendants is non-taxable.

(*a*) The fallacy of appellants' argument is that it treats the transfer as taking place in 1890, when, as we have seen, the taxable transfer occurred in 1899, when the power was exercised. The character of the property at the time of the taxable transfer controls, and at that time it was personal property.

(*b*) This constitutional question was not raised before the appraiser (see objections, III, Record, p. 22). Neither was it raised in the notice of appeal to the Surrogate (Record, p. 27, sub. III). The general clause at the end of the notice of appeal claims that the provisions are repugnant to the Constitution of the United States "as hereinabove set forth," and sets up and claims a privilege under the 14th Amendment "as aforesaid" (Record, p. 29, fol. 49). This refers simply to the subdivisions, I & II, of the notice of appeal, where a violation of the 14th Amendment is expressly claimed, but has no such application to Subdivision III, where no such claim is made. The notice of appeal to the Court of Appeals is in the same form and is defective for the same reason (Record, p. 35, Subdivision III and fol. 66). The constitutional question was not raised until in the Assignment of Errors (p. 53, II). It is well settled, that this is too late, and, therefore, no Federal question is raised.

(*c*) The Court of Appeals said, "as we have held that it was the execution of that power, which subjects grantees under it to the transfer tax, it follows that the condition or form of the property at the time of such execution must control" (Record, p. 46, fol. 84). If the power of appointment amendment is held

constitutional by this Court and the question now considered does not arise unless the act is valid, then the above construction given to the act by the Court of Appeals must be adopted by this Court, under the authorities cited in Point I of this Brief.

(*d*) On the merits there is no force in appellants' contention. For the purpose of taxation the actual character of the property at the time of the taxable transfer determines its taxability. The taxable succession in the grandchildren to the property accrued, not when David Dows, Senior, died in 1890, but when their father exercised the power in 1899, and then the property held by the Trustees first passed to and vested in the grandchildren. If Real Estate passed at that time, there could be no tax, but Real Estate did not pass to the grandchildren, because at that time the Trustees held no Real Estate. Under the powers contained in the Will of David Dows, Senior, the Real Estate had been sold years before, and the Trustees held only personal property, and it was this personal property, which then vested in the grandchildren by virtue of the exercise of the power. Under the Will of David Dows, Senior, these grandchildren never had any title to the Real Estate. It was in the Trustees and the Will expressly provides that only on the death of David Dows, Jr., shall the property *vest* in such of his children as he may appoint. What vested in the children of David Dows, Jr., in 1899, under the appointment in their father's Will, was the property then held by the Trustees of their grandfather's Will, and this was personal property and therefore taxable. The succession thus created, and taxed under the power of appointment amendment, was in the personal property, because that was the only kind of property in the possession of the Trustees.

The actual character of the property at the time the taxable transfer accrues determines its taxability. Fictions by which the law sometimes treats Real Estate as personal property, or personal property as Real Estate, cannot be resorted to, either to make a succession

taxable or exempt. Thus Real Estate, absolutely directed to be converted into personal property, cannot be taxed when the proceeds are given to direct heirs. The fiction of equitable conversion has no place in a tax law.

Matter of Sutton, 5 App. Div., 298; affirmed on the opinion below, 149 N. Y., 618.
Matter of Swift, 137 N. Y., 77.

The converse of that proposition must be equally true, and the doctrine cannot be resorted to for the purpost of exempting property from taxation.

Matter of Dows, 167 N. Y., at p. 232, Record, p. 46, fol. 46.

The act itself provides that "when a person exercises a power of appointment, such appointment when made shall be deemed a taxable transfer in the same manner, as though *the property to which such appointment relates,* belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will."

The transfer taxed in this case accrued in 1899, under the act by virtue of the exercise of the power in the Will of David Dows, Jr., and did not accrue by virtue of the Will of his father, who died, in 1890. The fiction of relation is abolished for all purposes. The act provides that the transfer must be treated as though David Dows, Jr., was the absolute owner "of the property to which *such appointment relates* and it had been bequeathed by him." To what property does the appointment relate? Certainly not to Real Estate, because the Trustees held none. It had been sold years before. It relates to the Trust Fund held by the Trustees in its condition at the time the power was exercised. This was personal property, and this personal property, and nothing else, passed to the children of David Dows, Jr., on the exercise of the power by their father and is therefore taxable. If David Dows, Jr., had been the absolute owner of this personal property held by the Trustees, and it passed

The language of Mr. Justice Harlan in *Lake Shore and Mich. Southern Railroad Co.* v. *Ohio*, 178 U. S., at p. 308, seems very applicable:

> "Imaginary cases are put for the purpose of showing what might be done by the State that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are opposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be a legitimate exercise of the police powers of the State, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

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